BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALFONSO OWENS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,379
CONTAINER SUPPLY COMPANY	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE	)	
COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the August 8, 2005, Preliminary Decision and August 10, 2005, Supplemental Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.[1]

ISSUES

This is a claim for a March 30, 2005, right thumb injury. Respondent contests this claim on the basis that claimant was both performing forbidden work and willfully disregarding safety precautions when the injury occurred.

In the August 8, 2005, Preliminary Decision and August 10, 2005, Supplemental Preliminary Decision, Judge Foerschler found the evidence showed claimant was injured while performing a function in his regular duties. Accordingly, the Judge ordered payment of temporary total disability benefits.

Respondent contends Judge Foerschler erred. Respondent argues the activity claimant was performing when the injury occurred was forbidden by respondent. Further, respondent maintains claimant willfully failed to follow safety precautions and instruction

[1] The August 8, 2005, Preliminary Decision was entered under Docket No. 1,020,186. It appears the August 10, 2005, Supplemental Preliminary Decision corrected the August 8, 2005, Preliminary Decision by adding Docket No. 1,022,379. The Supplemental Preliminary Decision also indicted that claimant's request for penalties was being taken under advisement until the regular hearing.

from respondent regarding forbidden activity. Consequently, respondent contends the preliminary hearing orders should be reversed and compensation in this claim should be denied.

Conversely, claimant contends the Preliminary Decision and Supplemental Preliminary Decision should be affirmed.

The only issues before the Board on this appeal are whether claimant's injury occurred while performing forbidden work or whether the injury occurred due to a willful failure to use a guard or other protection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the preliminary hearing orders should be affirmed.

On March 30, 2005, claimant injured his right thumb at work when it was caught in a machine used to manufacture plastic bottles. The machine's conveyor or ejection chute became jammed with bottles and, consequently, claimant reached inside the machine with his right hand to pull or rake down the bottles that had piled up in the machine. The mold in the machine closed and crushed the tip of claimant's thumb.

There is no question claimant knew he was not to repair the machine. But claimant does not consider freeing or straightening bottles as repairing or adjusting the machine. Instead, claimant specifically denies that he was attempting to repair the machine when the injury occurred.

> No. I wasn't trying to fix the machine. I was pulling down some bottles to the conveyor. I never touched the machine until it caught my finger, until the mold caught my finger. I wasn't working on the machine. I wasn't doing anything to the machine. I was reaching up, pulling the bottles down to the conveyor while they had piled up into the machine.[2]

Claimant's supervisor, Jimmy L. Newman, indicated he and respondent's Lisa Zimmer were the only two people trained and authorized to work on plant machinery. According to both Mr. Newman and Ms. Zimmer, a bottle jam could be corrected by bumping the bottles that are stacked up at the machine's ejection chute. Further, if there was a need to get to the inside of the machinery, the machine would be shut off. Mr. Newman stated claimant did not have permission for any reason to shut down machinery. However, Mr. Newman testified he would not have been upset if claimant had shut down

[2] P.H. Trans. (May 23, 2005) at 25.

machinery to clear a bottle jam without consulting him. Mr. Newman also testified bottle jams were typical of operation.

Mr. Newman stated he had told claimant before the March 30, 2005, incident, including that day, that claimant was not to try to repair or make any adjustments to plant machinery and that claimant was to ask Mr. Newman or Ms. Zimmer for assistance if the machinery was not operating properly.

Claimant denies he was told by Mr. Newman or Ms. Zimmer after they had started the plastic molding machine that night that he was not to touch the machine if anything went wrong with it. Nonetheless, claimant acknowledged Mr. Newman had previously told him not to "mess" with the machine or turn it off. Claimant stated he did not "mess" with the machine with regard to learning how to shut it off but that he knew how to shut off two other machines at the plant.

Respondent asserts claimant had been instructed not to repair or adjust plant machinery and, therefore, claimant was performing a prohibited act when the injury occurred. In addition, Mr. Newman questioned whether claimant had intentionally injured himself as it was quite difficult for a person to reach far enough and get caught in the machine as claimant had done.

Considering the record compiled to date, the Board affirms the Judge's finding that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. Claimant's job with respondent included packing bottles that were manufactured and, thus, would necessarily include freeing bottles that may have become jammed in the ejection chute or on the conveyor. Claimant was not attempting to repair or service the machinery at the time of his accident. Although it was unwise to reach his arm into the ejection chute to clear the bottle jam, the record establishes that claimant was performing his job duties in an unauthorized manner rather than performing forbidden work.[3] Accordingly, claimant is entitled to receive workers compensation benefits for his right thumb injury.

Respondent has challenged the compensability of this claim on the basis that the accident occurred when claimant willfully failed to use a guard or other protection.[4] In its brief to the Board, respondent wrote, in part:

> K.S.A. 44-501(d)(1) provides that "if the injury to the employee results from the employee's deliberate intention to cause such injury[;] or from the employee's willful

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[3] See *Hoover v. Ehrsam Company*, 218 Kan. 662, 544 P.2d 1366 (1976); *Willingham v. Richard Haman*, No. 1,006,099, 2003 WL 21688454 (Kan. WCAB June 18, 2003).

[4] See K.S.A. 44-501(d)(1).

> failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed." **Container Supply Co. contends that Claimant's injury resulted from his willful failure to use a reasonable and proper guard and protection voluntarily furnished through verbal admonitions as well as written warnings by the employer and, thus, compensation should be disallowed.** (Emphasis added.)[5]

It is not entirely clear, but it appears respondent is arguing that verbal admonitions constitute the guard or protection that claimant allegedly failed to use. The Board concludes the evidence fails to establish that claimant willfully failed to use a guard or other protection. Instead, the evidence reveals that claimant was injured when he was left to tend the machines without supervision and after being instructed not to stop the machine in question.

Based upon the above, claimant is entitled to receive workers compensation benefits for the March 30, 2005, accident.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.[6]

WHEREFORE, the Board affirms the August 8, 2005, Preliminary Decision and August 10, 2005, Supplemental Preliminary Decision entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of October, 2005.

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[5] Respondent's Brief at 4 (filed Aug. 30, 2005).

[6] K.S.A. 44-534a(a)(2).